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TSCA Regulatory Action Raises Retailers' Litigation Risk

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By now, manufacturers and retailers of composite wood products — including certain floorings, furniture, cabinets, shelving, picture frames and other hardwood plywood, medium-density fiberboard and particleboard products — are well aware of the increased regulation at both the federal and state levels related to formaldehyde emissions from such products. On Feb. 7, 2018, the U.S. Environmental Protection Agency issued a series of amendments to its final rule under Title VI to the Toxic Substances Control Act.

The final rule on formaldehyde is particularly significant because it represents the first time that the federal government has regulated formaldehyde emissions from consumer products, such as those listed above. It also includes various testing, certification, labeling and other requirements for manufacturers of covered composite wood products, and recordkeeping requirements for others in the supply chain — including, specifically, retailers. The deadline for compliance for the bulk of the provisions in the formaldehyde final rule is Dec. 12, 2018.

Without question, new regulations such as the formaldehyde final rule present risk to retailers associated with noncompliance. Retailers of covered products should be taking the necessary steps now to ensure that they will be in compliance with the rule by the December 2018 deadline. However, in the realm of tort litigation, we frequently observe increased litigation risk for retailers associated with increased regulatory action, even in the absence of regulatory noncompliance.

Formaldehyde emissions present a case in point. Specifically, the same formaldehyde emission limits contained in the formaldehyde final rule were instituted in California several years ago by the California Air Resource Board. Since the implementation of the CARB emission standards, there has been a sharp increase in claims nationally brought by plaintiffs alleging personal injury and/or property damage as a result of formaldehyde emissions in their homes.

The most widely publicized litigation has involved Lumber Liquidators Holdings Inc., a specialty retailer of hardwood flooring. Claims against the company were consolidated in multidistrict litigation in the U.S. District Court for the Eastern District of Virginia. In October 2017, Lumber Liquidators announced a memorandum of understanding that, if approved, would resolve a broad group of these claims for an aggregate settlement of \$36 million. Other retailers have faced similar claims in jurisdictions across the country.

Regulatory activity regarding a particular chemical or substance has a twofold impact on litigation. First,

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increased regulatory activity regarding a substance leads to an increased focus on that substance by opportunistic and entrepreneurial plaintiffs law firms. Plaintiffs firms begin to recruit potential litigants. Second, plaintiffs counsel then attempt to assert the regulatory exposure limits as a proxy for causation in human health effects litigation — asserting, for example, that if a product emits formaldehyde at, near or in excess of the regulatory standard, the causation element of their personal injury claim should be assumed.

This theory ignores that the regulatory risk assessment process is often inherently uncertain — for example, due to variability between test species (e.g., animals) and humans, gaps in understanding of the dose-response relationship in humans with respect to specific chemical exposures, etc. — and, as a result, is intended to err on the side of caution and overestimate risk. In other words, the regulatory exposure limits are often not necessarily tied to any scientific evidence of adverse human health effects at or above those limits.

The CARB emissions standards, for example, are intended to limit formaldehyde emissions to the extent feasible, but are not specifically health-based. Defending against this theory proves particularly slippery in the context of a chemical substance, such as formaldehyde, that is associated with ubiquitous and nonspecific health effects. With the EPA's focus on formaldehyde through the formaldehyde final rule, this type of litigation is likely to become more widespread, and has the potential to impact each member of the supply chain of the covered products at issue.

We observed a similar uptick in litigation associated with the U.S. Occupational Safety and Health Administration's 2016 rulemaking that reduced permissible exposure limits for silica. Although tort litigation associated with silica exposure peaked in the early to mid 2000s, increased regulatory activity in this area over the last several years resulted in a renewed focus on the substance and a noticeable increase in related litigation.

Although the increased regulation of formaldehyde emissions is a clear litigation risk for retailers of composite wood products in the year ahead, the EPA's increased regulatory activity under the 2016 amendments to the TSCA presents increased litigation risk to retailers more broadly. Specifically, the EPA is currently undertaking risk evaluations for 10 "high priority" chemical substances to determine associated human health and environmental risks, and any regulatory steps necessary to mitigate those risks. The list of 10 includes the following:

- 1,4-Dioxane
- 1-Bromopropane
- Asbestos
- Carbon tetrachloride
- Cyclic aliphatic bromide cCluster

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- Methylene chloride
- N-methylpyrrolidone
- Pigment Violet 29
- Tetrachloroethylene (also known as perchloroethylene)
- Trichloroethylene

These chemicals can be found in a wide variety of consumer products, such as cleaning and degreasing solvents; laundry and dishwashing products; furniture cleaners; plastic-based products and textiles; building materials; paints and coatings; automotive care products; art, craft and hobby materials (including watercolor and acrylic paints); and toys. The EPA is required to begin risk evaluations on at least 20 more chemicals by December 2019.

Again, we expect that the EPA's increased regulatory focus on each of these chemicals has the potential to increase litigation risk for manufacturers of products containing those chemicals and others in the supply chain — including retailers. In 2018, retailers should remain cognizant of the substances in the EPA's focus and be proactive in minimizing associated litigation risk.

This includes not only taking measures to ensure compliance with any rules resulting from the EPA's ongoing review efforts but, more broadly, taking measures such as (1) identifying retail products that contain these chemicals, (2) conducting any necessary information-gathering (for example, from manufacturers or others in the supply chain) to make informed assessments about the risks those products present from a human health and litigation standpoint, (3) determining what steps manufacturers and others in the supply chain are taking to ensure TSCA compliance and (4) implementing risk minimization protocols and steps as appropriate.

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